

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Waiver of the Part 15 UWB	)	ET Docket No. 04-352
Regulations Filed by the Multi-band OFDM	)	
Alliance Special Interest Group	)	
_____	)	

**SPRINT COMMENTS**

Sprint Corporation submits these comments in support of the petitions for reconsideration that Cingular Wireless and the Satellite Industry Association have filed in response to the *UWB Measurement Blanket Waiver Order*.<sup>1</sup> As Cingular explains, this *Order* contravenes the core requirements of the Administrative Procedures Act (“APA”) because the Commission abrogated a rule without commencing a new rulemaking proceeding.

FCC rules and orders require that any frequency sweep, hop or step function be inactive when measuring an ultra-wideband (“UWB”) device for compliance with the UWB emissions limits.<sup>2</sup> As the Commission stated only four months ago in its *Second UWB Order*:

In the *1<sup>st</sup> R&O*, the Commission specifically precluded the operation of swept frequency systems, stepped frequency systems, and frequency hopping systems under the UWB rules unless the transmissions comply with . . . the emission limits when measured with the sweep, step function or hopping sequence stopped. The Commission indicated that . . . the interference aspects had not been evaluated based on

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<sup>1</sup> See Cingular Wireless LLC, Petition for Reconsideration, ET Docket No. 04-352 (April 11, 2005); Satellite Industry Association, Petition for Reconsideration, ET Docket No. 04-352 (April 11, 2005); *Petition for Waiver of the Part 15 UWB Regulations Filed by the Multi-band OFDM Alliance Special Interest Group*, ET Docket No. 04-352, FCC 05-58 (March 11, 2005)(“*UWB Measurement Blanket Waiver Order*”).

<sup>2</sup> See *UWB Measurement Blanket Waiver Order* at ¶ 9. See also 47 C.F.R. § 15.521(d); Public Notice, *Filing and Measurement Guidelines for frequency Hopping Spread Spectrum Systems*, 15 FCC Rcd 18624 (March 30, 2000).

the different emission level results that would be obtained if measurements were taken with the sweep, step function or hopping active.<sup>3</sup>

In this *Second UWB Order*, the Commission amended its rules to permit certain frequency hopping vehicular radar systems to measure their compliance with emission levels by having the frequency hopping function active.<sup>4</sup> However, the Commission declined to provide the same relief (*i.e.*, amend its rules) with respect to other UWB devices that operate in other bands, because “[t]he interference aspects of frequency hopping systems have not been thoroughly evaluated based on the different results that would be obtained from measurements made with the hopping active.”<sup>5</sup>

The Commission in its *UWB Measurement Waiver Order* has now effectively abrogated the very measurement rule that it had reaffirmed only four months ago. While the Commission did not formally repeal Rule 15.521(d) in the *Order*, it achieved the very same result by “allowing any UWB device, not just MD-OFDM [that was the subject of the waiver petition] to be measured under normal operating conditions”:

[W]e see no technical justification to restrict these waivers only to gated DS-UWB devices or to MB-OFDM systems. Frequency hopped, frequency stepped, band sequenced and gated emissions all appear similar to a receiver and should be treated equally under the conditions of this waiver.<sup>6</sup>

As a result of the *Order*, the rule requirement that frequency sweep, hopped or step functions must be disabled during measurement no longer has any effect, because the Commission has now exempted all devices that had been subject to the rule.

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<sup>3</sup> *Second UWB Order*, ET Docket No. 98-153, FCC 04-285, 19 FCC Rcd 24558 at ¶ 29 (Dec. 16, 2004).

<sup>4</sup> *See id.* at ¶ 42. *See also* 47 C.F.R. § 15.252(c)(3).

<sup>5</sup> *Id.* at ¶ 42.

<sup>6</sup> *UWB Measurement Blanket Waiver Order* at ¶ 17 (emphasis added).

The APA requires the Commission to conduct a rulemaking proceeding whenever it wants to “formulat[e], amend[], or repeal[] a rule.”<sup>7</sup> In this regard, the Supreme Court has held that an APA rulemaking is required whenever an agency adopts “a new position inconsistent with” an existing rule or effects “a substantive change in the regulation.”<sup>8</sup> The Commission cannot bypass APA notice-and-comment procedures simply by granting a rule waiver to all persons that are subject to a rule.<sup>9</sup> Put another way, the Commission cannot do indirectly (*i.e.*, grant a blanket waiver without an APA rulemaking) what it cannot do directly (*i.e.*, repeal a rule without an APA rulemaking).

Of course, the Commission may grant a waiver of a rule if “special circumstances warrant a deviation from the general rule.”<sup>10</sup> But the MBOA-SIG petitioners never alleged any such special circumstances. Existing rules have never prohibited MB-OFDM devices, and MBOA-SIG members acknowledged that denial of their requested relief would have had “‘no effect’ on the product timelines.”<sup>11</sup>

The MBOA-SIG petitioners rather justified their waiver request on the ground that the requested relief would pose “no greater threat of harmful interference than pulsed UWB systems permitted by the rules.”<sup>12</sup> In other words, the petitioners took the position that Rule 15.521(d) is no longer necessary, and in the process, challenged the very validity of the rule that the Commis-

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<sup>7</sup> See 5 U.S.C. § 551(5); *see id.* § 553.

<sup>8</sup> *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1005). See also *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without [APA] notice and comment.”).

<sup>9</sup> Compare *Appalachian Power v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *C.F. Communications v. FCC*, 128 F.2d 735, 739 (D.C. Cir. 1997).

<sup>10</sup> *Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>11</sup> See Motorola Reply Comments, ET Docket No. 04-352, at 2 n.6 (Oct. 21, 2004).

<sup>12</sup> MBOA-SIA Petition for Waiver at 8 (Aug. 26, 2004).

sion had previously refused to amend. But as the Commission has recognized, the “very essence of a waiver is the assumed validity of the general rule,”<sup>13</sup> and it has refused to grant rule waivers that challenge the validity of the rule.

A waiver petition which challenges the basis for a rule, rather than assuming its validity and seeking an exception therefrom, generally ought to be considered through a rulemaking process which permits the rule in question to be directly re-evaluated.<sup>14</sup>

The Commission has stated its intent “at an appropriate time in the future to initiate a rule making to codify the provisions of this waiver for UWB devices.”<sup>15</sup> But as Cingular points out, this procedure – effectively repeal a rule by universal waiver and formally repeal the rule through rulemaking at a later unspecified date in the future – “stands the APA on its head and is arbitrary and capricious in its own right.”<sup>16</sup>

For the foregoing reasons, Sprint submits that the Commission should grant the reconsideration petitions filed by Cingular Wireless and the Satellite Industry Association.

Respectfully submitted,

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<sup>13</sup> *Universal Service Order*, 14 FCC Rcd 8030, 8036 ¶ 10 (1999), *quoting* *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>14</sup> *Telecom Services, Inc.*, 16 FCC Rcd 18623, 18625 ¶ 9 (2001).

<sup>15</sup> *UWB Measurements Blanket Waiver Order* at ¶ 19.

<sup>16</sup> Cingular Petition at 5.